Consequently, for these same reasons, I had disallowed the respondents' application for a stay of my order pending this appeal to the Supreme Court as to grant it would have meant not giving the said order at all.

Application allowed.

Solicitors: *Azman, Davidson & Co; Chan & Associates; Shook Lin & Bok.*

Reported by *PS Ranjan*

Re Yap Kim Kee & Sons Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP PETITION NO D4-42-242 OF 1988
ZAKARIA YATIM J
20 NOVEMBER 1989

Companies and Corporations — Winding up — Company unable to pay its debts — Setting aside winding-up petition — Letter of demand — Deemed to be unable to pay its debts — Companies Act 1965, s 218(1)(e) & (2)

On 20 November 1985, the petitioning creditor commenced a civil action against Yap Kim Kee & Sons Sdn Bhd ('the company') and Yap Kim Kee to claim for a sum of $232,000 after they had failed to make payment pursuant to a letter of demand sent a day earlier. On an O 14 application, the petitioning creditor was granted liberty to enter judgment for $145,000 and $350 costs and the balance of the claim and interest to proceed to trial. Based on this judgment, the petitioning creditor filed a petition to wind up the company stating that a demand in writing dated 19 November 1985 for the payment of the said sum was sent to the company's registered office but no payment was made. Accordingly, the company is unable to pay its debts and it is just and equitable that the company be wound up. The company applied, inter alia, that the petition be set aside. The main issue is whether the company is deemed unable to pay its debts by virtue of s 218(2)(a) of the Companies Act 1965.

Held, allowing the company's application:

(1) Although the demand in writing need not be in special form, it must comply strictly with the requirements of s 218(2)(a).

(2) The demand must be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. The demand must be served at the registered office of the company. The normal practice is to state in the notice (a) that the company must pay the sum due within 21 days from the date of the service of the demand and (b) failing which the company will be deemed unable to pay its debts and action will be taken to wind up the company.

(3) The letter of demand was bad and the company cannot be presumed to be unable to pay its debts because (a) the letter of demand was sent to the company before the civil action on 20 November 1985, the amount of which was disputed; (b) the letter was not signed and it was not stated who the solicitors were who wrote the letter; (c) the letter demanded 'immediate repayment'; (d) the letter threatened to institute legal proceedings against the company and Yap Kim Kee, and not a winding up proceeding; and (e) the amount demanded was $232,000 which was greater than the amount stated in the petition.

(4) There is no direct evidence to show that the company is unable to pay its debts or that it is insolvent.

Cases referred to

1 *Bateman Television Ltd & Anor* v *Coleridge Finance Co Ltd* [1969] NZLR 794 (refd)
2 *Re Willes Trading* [1977-78] ACLC 434 (follid)
3 *WT Henley's Telegraph Works Co Ltd* v *Gorakhpur Electric Supply Co Ltd* AIR 1936 All 840 (refd)
4 *Re Bryant Investment Co Ltd* [1974] 1 WLR 826 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), (2)

Sukhdev Singh for the respondent company.
J Kannaperan for the petitioner.

Cur Adv Vult

Zakaria Yatim J: This is an application by a company known as Yap Kim Kee and Sons Sdn Bhd (hereinafter referred to as 'the company') for an order that (a) the petition to wind up the company filed on 20 May 1988 be set aside; and/or (b) that all further proceedings be stayed until the final determination of the company's application for further arguments and/or further appeal in respect of the matter in Civil Suit No C7521 of 1985. The applicant asks that the costs of the application be costs in the cause.

I shall first deal with prayer (a). In the petition, the petitioning creditor states that the company is indebted to the petitioning creditor in the sum of $145,000 together with costs of $350 based on a judgment obtained in the High Court. The petition also states that a demand in writing dated 19 November 1985 for the payment of the said sum was sent to the company's registered office but no payment was made by the company. According to the petition, the company is unable to pay its debt and it is just and equitable that the company be wound up.

In order to consider prayer (a), it is relevant to see the sequence of events in the civil suit from the time the letter of demand was sent to the company to the time the judgment creditor obtained judgment against the company. Before the writ was issued the petitioning creditor, who was the plaintiff in the civil suit, wrote a letter of demand dated 19 November 1985 to the company, which was then the first defendant, and one Yap Kim Kee, the second defendant in the civil suit. The letter of demand required the defendants to repay the plaintiff immediately a sum of $232,000, failing which the plaintiff would institute legal proceedings against the defendants.

On 20 November 1985, the plaintiff filed a writ of summons in the High Court at Kuala Lumpur. In the statement of claim, the plaintiff claimed the same amount as stated in the letter of demand, that is the sum of

$232,000. On 28 November, the defendants entered appearance and on 18 December, the defendants filed their defence. On 25 January 1986, the plaintiff filed an application for summary judgment under O 14 of the Rules of the High Court 1980. The application was supported by the affidavit of one Yap Chin Huat, the director of the plaintiff, affirmed on 24 January 1986. In that affidavit, the deponent averred that the defendants were at the commencement of the suit truly and justly indebted to the plaintiff jointly in the sum of $232,000 and interest and costs. According to him, by a letter dated 19 November 1985, the plaintiff through its solicitors made demand upon the defendants for the return of the money. He added that despite the demand the defendants failed, refused and neglected to pay the sum claimed. The letter of demand was exhibited to the said affidavit. The second defendant, Mr Yap Kim Kee, affirmed an affidavit on 22 September 1986 opposing the plaintiff's application for summary judgment. In that affidavit, the deponent averred that the defendants were surprised to receive the letter of demand. He also averred that the sum of $145,000 was in fact paid to or received to the use of Mr Yap Chin Huat and the remaining sums of $57,000 and $30,000 paid to or received by other persons best known to the plaintiff or Mr Yap Chin Huat, its director. The deponent added that the defendants challenged the genuineness of the plaintiff's claim and asked the court to dismiss the application for summary judgment with costs. On 24 September 1986, the same deponent affirmed an affidavit and stated, inter alia, that the defendants had a strong defence to the claim and that the plaintiff's application ought to be dismissed with costs.

On 11 December 1986, when the application for summary judgment came up for hearing before the senior assistant registrar, the defendants and their solicitors were absent, and the senior assistant registrar ordered that final judgment be entered for the plaintiff against the defendants for the sum of $232,000 pursuant to O 14 of the Rules of the High Court 1980 with interest and costs. The summary judgment entered by the senior assistant registrar is reproduced below:

> Judgment
>
> The 11th day of December 1986.
>
> The defendants having entered appearance herein and the court having under O 14 ordered that judgment as hereinafter provided be entered for the plaintiffs against the defendants.
>
> It is this day adjudged that the defendants do pay the plaintiffs $232,000 together with interest at 12% pa from 12 September 1985 to the date hereof and further interest at the rate of 8% pa from the date hereof to the date of realization and $350 costs.
>
> Sgd
> Senior Assistant Registrar,
> High Court, Kuala Lumpur.

On 29 July 1987, the defendants filed an application under O 14 r 11 to set aside the above judgment. The defendants also applied for stay of execution proceedings pending the determination of their application. On 18 September 1987, the learned judge set aside the said judgment. On 12 December 1987, the senior assistant registrar heard the application for summary judgment in the presence of both parties and dismissed the plaintiff's application for summary judgment. The plaintiff filed its notice of appeal against the decision of the senior assistant registrar on 21 December 1987. On 10 February 1988, the learned judge allowed the appeal and ordered that the plaintiff be at liberty to enter judgment against the defendants for the sum of $145,000 and $350 costs and the balance of the claim and interest to proceed for trial. It was also ordered that the action be transferred to the sessions court for the trial in respect of the remaining sum. The judgment of the learned judge is reproduced below:

> Judgment
>
> Pursuant to the order of court dated 10 February 1988 whereby it was ordered that the appeal be allowed and that the order given on 17 December 1987 by the senior assistant registrar be and is hereby set aside and further order that the plaintiff be and is hereby at liberty to enter judgment against the defendants for the sum of $145,000 and $350 costs and with regards the balance of the claim and interest to proceed for trial and that this action be and is hereby transferred to the sessions court, Kuala Lumpur.
>
> It is this day adjudged that the defendants do pay the plaintiff the sum of $145,000 and $350 costs.
>
> Dated the 10th day of February 1988.
>
> Sgd
> Senior Assistant Registrar
> High Court, Kuala Lumpur.

It was on the basis of this judgment that the plaintiff proceeded with the winding-up proceedings against the first defendant.

In para 5 of the petition, the petitioning creditor referred to the above judgment and stated that the company was indebted to the petitioning creditor in the sum stated in the judgment. The petitioning creditor is asking the court to make a winding-up order against the company under s 218(1)(e) of the Companies Act 1965 on the ground that the company was unable to pay its debts. According to the petition, no payment was made by the company after the letter of demand dated 19 November 1985 had been served on it. A copy of the letter of demand is annexed to the petition and marked 'C'. The said letter of demand is reproduced below:

> Messrs Yap Kim Kee & Sons Sdn Bhd
> Room 1, 1st Floor
> Lee Rubber Building
> 145 Jalan Bandar
>
> By hand

And
Wisma Tek Lee, 1st Floor
38, Jalan Tun Perak
Kuala Lumpur

Mr Yap Kim Kee
Room 1, 1st Floor
Lee Rubber Building
145, Jalan Bandar
Kuala Lumpur

Dear Sirs

Sale and purchase of 14,700 shares in Kepong Development Sdn Bhd

We act for Messrs Tanah Setia Sdn Bhd.

We are instructed by our clients that our clients wish to purchase the above-mentioned shares in Kepong Development Sdn Bhd and did pay on the following dates the following sums of money to account of purchase price:

Date	Amount
18-22 July 1985	$ 57,000
30 July 1985	$ 30,000
12 September 1985	$ 145,000
	$ 232,000

We are instructed by our clients that despite the fact that the final draft sale and purchase agreement was delivered to yourselves in September 1985, you have failed to complete the sale and have decided not to proceed with the said transaction.

We are therefore instructed by our clients to demand, which we hereby do, the immediate repayment of the sum of $232,000, failing which, we have our clients' firm instructions to institute legal proceedings against yourselves without any further reference and you will be liable for all the ensuing costs.

Kindly disregard our earlier letter of 18 November 1985.

Yours faithfully,

The above letter of demand is the same letter of demand which was sent to the defendants before issuing the writ of summons against them on 20 November 1985.

The chairman of the company, in his affidavit affirmed on 3 August 1988, averred that para 6 of the petition stated 'that a demand was made on 19 November 1985. Exhibit 'C' in the petition is for the sum of $232,000.' He referred to the judgment dated 10 February 1988 which was the sum of $145,000 and averred that '... the notice of demand dated 19 November 1985 is for the sum of $232,000 which forms the very substratum of the winding-up petition is wrong, improper and without any effect in law'. The deponent further averred that the petitioning creditor '... had not made any demand up to date for the judgment sum of $145,000'. According to him, 'this petition for winding up is premature and ought to be set aside for non compliance with s 218(2) of the Companies Act 1965'.

The petitioning creditor, in its affidavit affirmed on 4 October 1988, averred that the basis of the winding-up petition was the judgment sum of $145,000 which was decided by the learned judge on 10 February 1988. The deponent also averred that '... there is no breach of s 218(2) the Companies Act 1965 as s 218(2) is a deeming section which requires a demand for a debt due, and 'debt due' being a sum exceeding $500'. The deponent went on to state that the 'petitioner did by their solicitors make a demand for the debt due by a letter dated 19 November 1985'. When the deponent referred to the 'debt due' in the letter of demand, he must be referring to the sum of $232,000 as debt due to the petitioning creditor.

Miss J Kannaperan, counsel for the petitioning creditor, drew the attention of the court to p 3 of the petition and submitted that the petitioning creditor had made a demand. She also referred to s 218(1)(e) and (2) of the Companies Act 1965.

It appears to me, from the petition and the letter of demand attached thereto, from the affidavit evidence and the submission of counsel for the petitioning creditor, the petitioning creditor is saying that since the company failed to comply with the letter of demand dated 19 November 1985, it was deemed to be unable to pay its debts and accordingly the company should be wound up under s 218(1)(e).

The company did not dispute that there was a judgment entered against it in the sum of $145,000 and $350 costs.

The main issue here is whether the company is deemed to be unable to pay its debts by virtue of s 218(2)(a). The section states:

> (2) A company shall be deemed to be unable to pay its debts if
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

There is no prescribed form for a letter of demand either in the Companies Act 1965 or in the Companies (Winding-Up) Rules 1972. *Palmer's Company Precedents Part II (Winding-Up)* (17 Ed), in a commentary on s 223(a) of the English Companies Act 1948, which is almost identical to our s 218(2)(a), states that the demand in writing need not be in special form. I do not dispute the view expressed in *Palmer's Company Precedents*, but it must be borne in mind that the purpose of the demand is to warn the debtor of an impending petition: *Bateman Television Ltd & Anor* v *Coleridge Finance Co Ltd*[1] at p 803.

The letter of demand must strictly comply with the requirements of s 218(2)(a): *Re Willes Trading*[2] and J O'Donovan, *The Law of Company Liquidation* (3rd Ed) at p 48. See also *WT Henley's Telegraphic Works Co Ltd* v *Gorakhpur Electric Supply Co Ltd.*[3] In *Re Willes Trading*,[2] Needham J of the Supreme Court of New South Wales stated in his judgment that: 'The deeming effect of the notice ... arises only if the notice is in full compliance with the conditions set out in the section itself ...' Needham J was referring to s 222(2)(a) of the Companies Act which is identical to our s 218(2)(a). I respectfully agree with the view expressed by Needham J.

Accordingly, the demand must be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. The demand must be served at the registered office of the company. See J O'Donovan, *The Law of Company Liquidation*, pp 48 and 49. The normal practice is for the creditor to also state in the notice (1) that the company must pay the sum due within 21 days from the date of the service of the demand and (2) failing which the company will be deemed unable to pay its debt and action will be taken to wind up the company.

As already stated, the letter of demand relied upon by the petitioning creditor in the petition was the letter of demand dated 19 November 1985. First, it was a letter of demand sent to the company before the petitioning creditor instituted the civil suit on 20 November 1985. The amount stated in the letter of demand was disputed by the defendants at the O 14 stage. Secondly, the letter was not signed and it was not stated who the solicitors were who wrote the letter. Thirdly, the letter demanded 'immediate repayment'. This is contrary to s 218(2)(a) which provides that payment must be made within three weeks after the service of the letter of demand. Fourthly, the letter threatened to institute legal proceedings against the company and one Yap Kim Kee and not a winding-up proceeding. Fifthly, the amount demanded in the letter was $232,000 which was greater than the amount stated in the petition, that is $145,000 together with costs of $350. No statutory presumption of insolvency will arise from a failure to pay in response to a demand which was in excess of the amount stated in the petition. See J O'Donovan, *The Law of Company Liquidation.*

In the circumstances, the letter of demand dated 19 November 1985 was bad and the company cannot be presumed to be unable to pay its debts. Indeed the court will not be prepared to make a winding-up order based on unsatisfied statutory demand. See *Re Bryant Investment Co Ltd.*[5]

Since the petitioning creditor is unable to invoke the presumption under s 218(2)(a), the question is whether there is direct evidence to show that the company is unable to pay its debts or it is insolvent. I have examined all the affidavits and the documents exhibited thereto and I find that there is no such evidence.

For the reasons stated above, the petition is set aside. The costs of this application shall be costs in the cause. With regard to prayer (b), the company is in fact asking for a stay of the winding-up proceeding. This is stated in para 4 of the company's affidavit affirmed on 3 August 1988. Paragraph 4 states:

> I am also to state that in the alternative, this petition for winding up and all proceedings thereafter ought to be stayed in the interest of justice ...

Since the petition has been set aside, the question of stay of the winding-up proceeding does not arise.

Application allowed.

Solicitors: *Sukhdev Singh & Co*; *Shearn Delamore & Co.*

Reported by *Shaun Chan*

Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai, Butterworth

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 31-446-88
MOHAMED DZAIDDIN J
4 NOVEMBER 1989

Administrative Law — Local authority — Housing scheme — Layout plan approved with conditions — Landscaping and tree planting required to be undertaken — Whether a valid condition — Condition for car park lots imposed — Whether conditions may be added to or amended after approval of layout plan — Whether monetary contribution may be levied following non-fulfilment of condition — Ultra vires — Local Government Act 1976 — Street, Drainage and Building Act 1974, ss 70 & 132 — Town and Country Planning Act 1976, ss 21 & 22

Local Government — Local authority — Housing scheme — Layout plan approved with conditions — Landscaping and tree planting required to be undertaken — Whether a valid condition — Condition for car park lots imposed — Whether conditions may be added to or amended after approval of layout plan — Whether monetary contribution may be levied following non-fulfilment of condition — Ultra vires — Local Government Act 1976 — Street, Drainage and Building Act 1974, ss 70 & 132 — Town and Country Planning Act 1976, ss 21 & 22

Words and Phrases — 'Any other matter' — Town and Country Planning Act 1976, s 21(3)

The applicant was the owner of a piece of land on which it had establised a housing scheme. The applicant brought an action against the respondent local authority and sought declarations that the tree planning and car park contributions paid by the applicant to the respondent were, inter alia, null and void and ultra vires the relevant legislation and that the applicant was entitled to the refund of the moneys paid as contributions.